Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–567 OF 1997

MOKHTAR SIDIN, ZULKEFLI AND SURIYADI JJCA
19 SEPTEMBER 2007

Civil Procedure — Affidavits — Capacity of deponent — Whether affidavit sworn by legal assistant on behalf of a corporation admissible — Companies Regulation 1966 reg 17(1)

Civil Procedure — Jurisdiction — Inherent — Whether senior assistant registrar has inherent judicial power to hear and decide on land matters — National Land Code s 417(1)

Civil Procedure — Parties — Striking out of — Lease agreement signed with Malayan Railway or Keretapi Tanah Melayu — First defendant contended not a party to lease agreement — Whether there had been vesting of rights and obligations on first defendant

On 23 April 1982 a lease agreement under seal was entered into between the plaintiff and the general manager of the Malayan Railway for and on behalf of the Federal Land Commissioner in respect of a railway reserve. The lease was for 30 years with an option to renew for a further period of 30 years at an agreed rental. However, on 28 December 1984 the lease was terminated by the Malayan Railway administration purportedly by reason of a government directive. The plaintiff filed a writ against the first defendant seeking for specific performance of the said lease agreement or alternatively for consequential damages. The first defendant applied to strike out the plaintiff's amended writ and statement of claim pursuant to O 18 r 19 of the Rules of the High Court 1980 which was allowed by the senior assistant registrar and upheld by the learned High Court judge. The plaintiff appealed. The main issue to be determined in this appeal was whether the learned judge of the High Court was correct in deciding that the pleadings by the plaintiff did not disclose a reasonable cause of action as against the first defendant having regard to all relevant legislations and government gazette notifications. It was the contention of the first defendant that it was not a party to the lease agreement which was apparent from the pleadings. As such, the first defendant owed no obligation or liability to the plaintiff and had been wrongfully sued by the plaintiff. For the plaintiff it was argued that it was the then Malayan Railway or Keretapi Tanah Melayu which executed the lease agreement with the plaintiff and following from there Keretapi Tanah Melayu Berhad, the first defendant was the successor company to Keretapi Tanah Melayu. The plaintiff therefore contended that it had sued the rightful party.

Held, dismissing the appeal:

(1) Having referred to the relevant legislations and government gazette notifications the court was of the view that the first defendant was not the successor company to the Malayan Railway. Section 92(2) of the Railway Act 1991 ('the Act') which came into force on 2 September 1991 replacing the Railway Ordinance 1948 vested, inter alia, all property of the Malaysian Railway with the second defendant, the Railway Asset Corporation. Section 93 of the Act provided that all property vested in, held or acquired by the Federal Lands Commissioner under the repealed ordinance shall vest with the second defendant. The Railway (Successor Company) Act 1991 ('Successor Company Act') provided for the vesting of property, rights and liabilities of the Railway Assets Corporation in a company ie the first defendant. Pursuant to s 3 of the Successor Company Act and Part II of the Schedule of the Vesting Order of PU(A) 294 dated 30 July 1992 which was effective from 1 August 1992, it provided that all rights and obligations under the trading agreements and commercial agreements other than those arising from or relating to lease and tenancies were vested with the first defendant (see para 6).

(2) It was the court's view that the effect of the vesting order was that all leases and tenancies remain vested with the second defendant. Since the plaintiff had claimed against the first defendant for specific performance in respect of the lease agreement and as the Vesting Order of PU(A) 294 dated 30 July 1992 excluded leases and tenancies, there was no vesting of rights and/or liabilities on the first defendant in respect of the lease agreement. On this ground alone the plaintiff's claim against the first defendant must fail (see para 6).

(3) The court was unable to agree with the contention of the plaintiff that by virtue of PU(A) 304, Keretapi Tanah Melayu Berhad had assumed all rights and liabilities from Railway Assets Corporation with retrospective effect from 1 August 1992 and that Keretapi Tanah Melayu Berhad was automatically made a party to all litigations before the courts in Malaysia. The rights and liabilities of the second defendant, the Railway Assets Corporation in respect of the legal proceedings as specified in Part II of the Schedule in the Government Gazette PU(A) 304 only apply to the legal proceedings clearly specified in the Schedule. Thus PU(A) 304 was not applicable and relevant to the current appeal before this court because this suit was never listed in Part II of the Schedule. If it was indeed the intention of the Minister to vest all rights and liabilities with regard to this suit to the first defendant, the Minister would have explicitly included this suit into Part II of the Schedule just like the other cases (see paras 8–9).

[Bahasa Malaysia summary

Pada 23 April 1982 satu perjanjian pajakan di bawah meterai dimasuki antara plaintif dan pengurus am Keretapi Tanah Melayu bagi dan untuk pihak Pesuruhjaya Tanah Persekutuan berhubungan dengan keretapi rizab. Pajakan tersebut adalah untuk 30 tahun dengan satu opsyen untuk memperbaharui untuk jangka masa 30 tahun lagi pada sewaan yang dipersetujui. Akan tetapi pada 28 Disember 1984 pajakan tersebut ditamatkan oleh pentadbiran Keretapi Tanah Melayu kononnya disebabkan oleh satu

arahan kerajaan. Plaintif memfailkan satu writ terhadap defendan pertama menuntut pelaksanaan spesifik perjanjian pajakan tersebut atau secara alternatif untuk ganti rugi yang berikutan. Defendan pertama memohon untuk membatalkan writ pindaan plaintif serta pernyataan tuntutan mengikut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 yang dibenarkan oleh penolong kanan pendaftar dan dikekalkan oleh hakim Mahkamah TInggi yang bijaksana. Plaintif merayu. Isu penting untuk diputuskan di rayuan ini ialah sama ada hakim Mahkamah TInggi yang bijaksana betul dalam memutuskan bahawa pliding-pliding plaintif tidak mendedahkan satu kausa tindakan yang munasabah terhadap defendan pertama setelah mengambilkira kesemua undang-undang yang munasabah dan pemberitahuan warta kerajaan. Ia adalah penegasan defendan pertama bahawa ia bukanlah pihak kepada perjanjian pajakan tersebut jelas daripada pliding-pliding tersebut. Dengan itu, defendan pertama tidak mempunyai sebarang obligasi ataupun liabiliti terhadap plaintif dan telah disaman dengan salahnya oleh plaintif. Bagi pihak plaintif, ia dihujahkan bahawa ia adalah pada masa tersebut Malayan Railway atau Keretapi Tanah Melayu yang telah menandatangani perjanjian pajakan dengan plaintif dan berikutan dari situ Keretapi Tanah Melayu Berhad, defendan pertama adalah syarikat pengganti kepada Keretapi Tanah Melayu. Dengan itu plaintif berhujah bahawa ia telah menyaman parti yang betul.

Diputuskan, menolak rayuan tersebut:

(1) Setelah merujuk kepada undang-undang yang relevan dan pemberitahuan warta kerajaan mahkamah berpendapat bahawa defendan pertama bukannya syarikat pengganti kepada Keretapi Tanah Melayu. Seksyen 92(2) Akta Keretapi 1991 ('Akta tersebut') yang berkuatkuasa pada 2 September 1991 mengganti Ordinan Keretapi 1948 meletakhak, inter alia, kesemua hartanah Keretapi Malaysia dengan defendan kedua, Perbadanan Aset Keretapi. Seksyen 93 Akta tersebut memperuntukkan bahawa kesemua hartanah yang diletakhak di dalam, dipegang atau diperoleh oleh Pesuruhjaya Tanah Persekutuan di bawah ordinan yang dimansuhkan itu akan diletakhak dengan defendan kedua. Akta Keretapi (Syarikat Pengganti) 1991 memperuntukkan perletakkan hak hartanah, hak-hak dan liabiliti- liabiliti Perbadanan Aset Keretapi kepada satu syarikat, iaitu defendan pertama. Menurut s 3 Akta Syarikat Pengganti dan Bahagian II Jadual Perintah Letakhak PU(A) 294 bertarikh 30 Julai 1992 yang berkuatkuasa daripada 1 Ogos 1992, ia memperuntukkan bahawa kesemua hak-hak dan obligasi-obligasi di bawah perjanjian-perjanjian perdagangan dan perjanjian-perjanjian komersial selain daripada yang berbangkit ataupun berhubung dengan pajakan-pajakan dan sewaan-sewaan diletakhak dengan defendan pertama (lihat perenggan 6).

(2) Ia adalah pendapat mahkamah bahawa kesan perintah letakhak ialah bahawa kesemua pajakan-pajakan dan sewaan-sewaan kekal diletakhak dengan defendan kedua. Oleh kerana plaintif telah menuntut terhadap defendan pertama untuk pelaksanaan spesifik berhubung dengan perjanjian pajakan dan oleh kerana Perintah Letakhak PU(A) 294 bertarikh 30 Julai 1992 mengecualikan pajakan-pajakan dan sewaan-sewaan, tiada perletakhak dan/atau liabiliti-liabiliti ke atas defendan pertama berhubung dengan

perjanjian pajakan tersebut. Atas alasan ini sahaja, tuntutan plaintif terhadap defendan pertama mesti gagal (lihat perenggan 6).

(3) Mahkamah tidak dapat bersetuju dengan hujahan plaintif bahawa mengikut PU(A) 304, Keretapi Tanah Melayu Berhad telah mengambil kesemua hak-hak dan liabiliti-liabiliti daripada Perbadanan Aset Keretapi secara retrospektif bermula dari 1 Ogos 1992 dan bahawa Keretapi Tanah Melayu Berhad secara automatik dijadikan pihak kepada semua litigasi-litigasi sebelum mahkamah-mahkamah di Malaysia. Hak-hak dan liabiliti-liabiliti defendan kedua, Perbadanan Aset Keretapi berhubung dengan prosiding undang-undang seperti yang dinyatakan di Bahagian II Jadual Warta Kerajaan PU(A) 304 hanya terpakai kepada prosiding undang-undang yang jelas dinyatakan di Jadual tersebut. Dengan itu PU(A) 304 adalah tidak terpakai dan relevan kepada rayuan sebelum mahkamah ini oleh kerana tindakan ini tidak disenaraikan di Bahagian II Jadual tersebut. Sekiranya benar hasrat Menteri untuk meletakhak kesemua hak-hak dan liabiliti-liabiliti berhubungan dengan tindakan ini kepada defendan pertama, Menteri tersebut akan secara nyata memasukkan tindakan ini kepada Bahagian II Jadual tersebut seperti kes-kes yang lain (lihat perenggan 8–9).]

Notes

For a case on capacity of deponent, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 362.

For cases on inherent jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4529–4533.

For cases on striking out of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5149–5153.

Cases referred to

EBBW Vale Urban District Council v South Wales Traffic Area Licensing Authority [1951] 2 KB 366 (refd)

Hadley v Baxendale (1854) 9 Ex 341 (refd)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd [1985] 1 MLJ 226 (refd)

Legislation referred to

Companies Regulation 1966 reg 17(1)
Contracts Act 1950 s 74(1)
National Land Code s 417(1)
Railway (Successor Company) Act 1991 s 3
Railway Act 1991 ss 2, 92(2), 93
Railway Ordinance 1948 s 2
Rules of the High Court 1980 O 18 r 19(1)(a), O 36 r 2

Appeal from: Civil Suit No S1–22–125 of 1994 (High Court, Kuala Lumpur)

M Manoharan (M Manoharan & Co) for the appellant.

Kumar Kanagasingam (Gobinath Karuppan Shanta with him) (Lee Hishammuddin Allen Gledhill) for the respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the plaintiff against the decision of the learned judge of the High Court at Kuala Lumpur dismissing the plaintiff's appeal against the decision of the learned senior assistant registrar allowing the first defendant's application to strike out the plaintiff's amended writ and statement of claim with costs.

BACKGROUND FACTS

[2] The relevant background facts of the case are as follows:

[3] On 23 April 1982 a lease agreement under seal was entered into between the plaintiff and the General Manager of the Malayan Railway for and on behalf of the Federal Land Commissioner in respect of a railway reserve. The lease was for 30 years with an option to renew for a further period of 30 years at an agreed rental. However, on 28 December 1984 the lease was terminated by the Malayan Railway Administration purportedly by reason of a Government directive. Subsequently, there were negotiations between the parties to grant the plaintiff a lease on short term basis which did not materialize. Hence, the plaintiff filed a writ against the first defendant seeking for specific performance of the said lease agreement dated 23 April 1982 or alternatively for consequential damages.

[4] At the appeal stage before us the plaintiff had filed two Notices of Motion as in encl (24A) and in encl (46A) for leave to adduce fresh documentary evidence at the hearing of the plaintiff's appeal. Having heard the parties we made an order in term of the plaintiff's application in encl (24A) and encl (46A).

DECISION ON APPEAL

[5] The main issue to be determined in this appeal is whether the learned judge of the High Court was correct in deciding that the pleadings by the plaintiff did not disclose a reasonable cause of action as against the first defendant having regard to all relevant legislations and Government Gazette Notifications. It is the contention of the first defendant that it is not a party to the lease agreement which is apparent from the pleadings. As such, the first defendant owes no obligation or liability to the plaintiff and has been wrongfully sued by the plaintiff. For the plaintiff it was argued that it was the then Malayan Railway or Keretapi Tanah Melayu which executed the lease agreement with the plaintiff and following from there Keretapi Tanah Melayu Berhad, the first defendant is the successor company to Keretapi Tanah Melayu. The plaintiff therefore contended that it had sued the rightful party.

[6] Having referred to the relevant legislations and Government Gazette Notifications we are of the view that the first defendant is not the successor company to the Malayan Railway. Section 2 of the Railway Ordinance 1948 ('the Ordinance')

defines 'railway land' which includes, inter alia 'railway reserve'. 'Railway reserve' is also defined in the same section. Railway land has been defined under the Ordinance to mean land vested in or held by the Federal Lands Commissioner or any other person for the purposes of the railway and land in occupation or under the contract of the railway administration and includes railway reserve. The Railway Act 1991 ('the Act') came into force on 2 September 1991 which repealed the Ordinance. Section 2 of the Act defines 'railway reserves' in more or less the same fashion as the 'railway reserves' under the Ordinance. Although 'railway land' is not defined in the Act, Section 2 of the Act defines 'property' as moveable or immoveable property. Section 92(2) of the Act vests, inter alia, all property of the Malaysian Railway with the second defendant, the Railway Asset Corporation. Section 93 of the Act provides that all property vested in, held or acquired by the Federal Lands Commissioner under the repealed ordinance shall vest with the second defendant. The Railway (Successor Company) Act 1991 ('Successor Company Act') provides for the vesting of property, rights and liabilities of the Railway Assets Corporation in a company ie the first defendant. Pursuant to s 3 of the Successor Company Act and Part II of the Schedule of the Vesting Order of PU(A) 294 dated 30 July 1992 which was effective from 1 August 1992, it provides that all rights and obligations under the trading agreements and commercial agreements other than those arising from or relating to lease and tenancies are vested with the first defendant. In our view the effect of the vesting order is that all leases and tenancies remain vested with the second defendant. Since the plaintiff has claimed against the first defendant for specific performance in respect of the lease agreement and as the Vesting Order of PU(A) 294 dated 30 July 1992 excludes leases and tenancies, it is our judgment that there is no vesting of rights and/or liabilities on the first defendant in respect of the lease agreement. On this ground alone the plaintiffs claim against the first defendant must fail.

[7] Learned counsel for the plaintiff in his submission brought to our attention the provision of para 2 of Gazette Notification PU(A)304 signed by the Minister of Transport, on 11 August 1995 which states as follows:

> The Minister has appointed 1 August 1992 as the vesting date and on that date all rights and liabilities of the Railway Assets Corporation as in Part I of the Schedule and all rights and liabilities of the Railway Assets Corporation in respect of the legal proceedings as specified in Part II of the Schedule shall be transferred to and vested in the successor company, namely KERETAPI TAN AH MELAYU BERHAD, 'without' any conveyance, assignment or transfer whatever.

[8] It is the contention of the plaintiff that under Part II of the Gazette No 304 dated 11 August 1995, the Minister had included all the old cases sued by the then Malaya Railway against various defendants but had deliberately covered up all legal suits filed against the Malayan Railway and the successor company including the present suit filed on 12 March 1994. Section 3(4) of the Successor Company Act was also referred by the plaintiff which provides that it shall not be necessary for the company or the Railway Assets Corporation to give notice to the person whose right or liability is affected by the vesting under subsection (1). It is the contention of the plaintiff by virtue of PU(A) 304, Keretapi Tanah Melayu Berhad had assumed all rights and liabilities from Railway Assets Corporation with retrospective effect from

A 1 August 1992. The plaintiff had therefore sued the rightful party as Keretapi Tanah Melayu Berhad is automatically made a party to all litigations before the courts in Malaysia.

[9] With respect we could not agree with the above contention of the plaintiff. It is
B our view that the rights and liabilities of the second defendant, the Railway Assets Corporation in respect of the legal proceedings as specified in Part II of the Schedule in the Government Gazette PU(A) 304 only apply to the legal proceedings clearly specified in the Schedule. Thus PU(A) 304 is not applicable and relevant to the current appeal before this court because this suit was never listed in Part II of the
C Schedule. We also take the view that if it is indeed the intention of the Minister to vest all rights and liabilities with regard to this suit to the first defendant, the Minister would have explicitly included this suit into Part II of the Schedule just like the other cases.

[10] It was also argued for the plaintiff that the affidavit affirmed by Nor Aida
D Othman, the Legal Officer on behalf of the first defendant is invalid and inadmissible and in fact was wrongly admitted before the Senior Assistant Registrar and the judge. On this point learned counsel for the plaintiff referred to us the provision of the reg 17(1) of the Companies Regulation 1966 which states that an affidavit or a statutory declaration sworn or declared for the purpose of the Act or these Regulations on
E behalf of a Corporation shall be sworn or declared by a director or by the secretary of the Corporation. Again, with respect we could not agree with the plaintiffs contention. It is our view the said reg 17(1) is only applicable for the purpose of the Companies Act and Companies Regulations and the same does not affect the validity of an affidavit affirmed by a person who has been duly authorized to affirm an
F affidavit on behalf of a corporation.

[11] Learned counsel for the plaintiff further argued as a ground of appeal that the learned senior assistant registrar has no inherent judicial power under s 417(1) of the National Land Code to hear and decide on land matters which involved a claim of
G RM3.5m by the plaintiff in this case without the consent of the parties concerned. With respect we could not agree. It has to be noted that the current suit was filed by the plaintiff seeking inter alia, specific performance of a lease agreement and damages arising from the alleged breach of contract. The subject matter of this suit was and is still a breach of contract. Further, the application made under O 18 r 19 of the Rules of the High Court ('the RHC') to strike out the plaintiffs claim is an
H interlocutory application that may be heard either before a senior assistant registrar or deputy registrar.

[12] The plaintiffs submission that pursuant to O 36 r 2 of the RHC, both parties must agree to refer the matter to learned senior assistant registrar is also misconceived
I as the O 36 r 2 applies for matters to be tried or to be inquired before the Registrar. As regards the provision of s 417(1) of the National Land Code, it is our view that it only applies for the purpose of enforcement of any punishment or order of the court. It does not nullify the jurisdiction of any Registrars to hear an application under O 18 r 19 of the RHC. In any event pursuant to Practice Direction No 1 of 1995 issued by the Chief Judge of Malaya all applications to strike out pleadings and

indorsements under O 18 r 19 of the RHC shall be heard by the Registrar. Further the plaintiff did not raise any objection with regard to the power of the learned senior assistant registrar to hear the first defendant's application under O 18 r 19 of the RHC during the hearing before the learned Assistant Registrar and therefore the plaintiff is estopped from raising the same at this stage.

[13] The plaintiff had challenged the Gazette Notification PU(A) 294 dated 30 July 1992 issued by the Minister of Transport as being irrelevant to the plaintiffs claim against the first defendant. The plaintiff has adduced various evidence to support its argument that Gazette Notification PU(A) 294 is rendered redundant, obsolete and meaningless by the sale of plaintiffs leased land to third party. For the first defendant it was submitted that the court should reject the plaintiffs argument on this point. This is because the learned judge of the High Court had struck out the plaintiffs amended writ and statement of claim pursuant to O 18 r 19(1)(a) only. The first defendant contended that O 18 r 19(2) of the RHC shall mutatis mutandis apply to this court by virtue of r 4 of the Rules of the Court of Appeal 1994 in that no evidence is admissible on an application under O 18 r 19(1)(a) of the RHC. On this point in the case of *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd* [1985] 1 MLJ 226 the Federal Court had this to say (at Held (1):

> ... the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action... The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action... is obviously unsustainable.

[14] We therefore agree with the first defendant's submission that no evidence but only the pleadings are to be taken into consideration by this court in the present appeal. Even if we were to decide in this appeal by perusing the fresh documentary evidence under the plaintiffs two motion application in encl (24A) and encl (46A), which we had allowed the documents the plaintiff had produced are as follows:

(a) Title Deeds bearing Title No HSD 98028 and HSD 98393;

(b) Location Plan with Land Title Deeds;

(c) Land Title Deed HSD 84515;

(d) Copies of SSM computer printouts;

(e) A copy of the Consolidated Accounts of Keretapi Tanah Melayu Berhad.

(f) A copy of the International Accounting Standards 2002 and Applying International Accounting Standards;

(g) Copy of the Sale & Purchase Agreement dated 23 September 1995;

(h) Kuala Lumpur High Court case under Originating Summons No S5–24–1213–2003 and affidavit of Hamidah binti Maktar;

(i) Latest SSM print-out report;

(j) Layout Plan from the Kementerian Pendidikan Malaysia;

(k) Copies of photographs;

(l) Copies of the first defendant Ordinary Resolution together with Form 52;

(m) Extract of Annual Return on 9 June 2004; and

(n) Copy of Company Auditor' s report.

[15] Having referred to the above mentioned documents, we find that the evidence do not show that the first defendant is the owner of the railway lands under the lease agreement. As clearly evident from the plaintiffs own land title search at the Pejabat Tanah dan Galian WP, Kuala Lumpur, the 40 land titles were issued to KTMB (Sentul) Sdn Bhd via Syarikat Tanah dan Harta Sdn Bhd and then transferred to Sentul Raya Sdn Bhd. The first defendant was never a party to the alleged transfer. KTMB (Sentul) Sdn Bhd and the first defendant are separate entities. The first defendant did not at any time receive a transfer of the said 40 land titles from any party.

[16] As regards the plaintiffs submission that the first defendant was cited as the owner of the railway reserve land in the Kuala Lumpur High Court case under Originating Summons No S5–24–1213–2003, we find that the sale and purchase agreement was between the 15 purchasers and Sentul Raya Sdn Bhd. The first defendant was not privy to the sale and purchase agreement because Sentul Raya Sdn Bhd and the first defendant are different entities and that the evidence is not relevant whatsoever to the current appeal.

[17] From the plaintiffs own search at the Suruhanjaya Syarikat Malaysia (SSM) on 28 February 2003, it merely shows that the first defendant is the shareholder of KTMB (Sentul) Sdn Bhd. This does not change the position that the first defendant is different entity altogether. Moreover, the accounting definition adopted by the International Accounting Standards Board is totally irrelevant because in law the first defendant is still a different entity following the doctrine of separate legal entity (see the case of *EBBW Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366 at p 370).

[18] It is our judgment that the first defendant is not the correct party to whom liability is attached as clearly evinced in Government Gazette PU(A) 294 which vests liabilities in respect of leases and tenancies with the second defendant. It is very clear that the new evidence the plaintiff seek to produce do not in any way show that the first defendant is the owner of the leased land under the lease agreement or owner of any railway reserve land. The evidence in any event do not change the position that pursuant to the Government Gazette PU(A) 294 liabilities in respect of leases and tenancies are vested with the second defendant and not with the first defendant.

[19] We also find the Board Resolution filed on 3 August 1995 with the Registrar of Companies relied upon by the plaintiff was the resolution of KTMB (Sentul) Sdn. Bhd and not that of the first defendant, as clearly evident from the face of the exhibit itself. KTMB (Sentul) Sdn Bhd and the first defendant are two totally different entities. From the plaintiffs own evidence, it is clear that KTMB (Sentul) Sdn Bhd was the party to the land sale as alleged by the plaintiff and not the first defendant. Therefore the first defendant cannot be said to have sold the plaintiffs land to any

third party on 3 August 1995 nor discreetly disposed of the any railway land at Sentul to Taiping Consolidated Berhad on 8 December 1993. In addition, the first defendant had never acknowledged the said Board Resolution of the first defendant as produced by the plaintiff in its affidavit dated 4 September 2006. In the said affidavit, the first defendant averred that 'the resolution referred to by the plaintiff is a member's resolution passed by a subsidiary of the first defendant sometime in August 1995'. The onus remains on the plaintiff and not the first defendant to prove the registration of Lot PT 3 and PT 2 bearing Title Nos HSD 98028 and HSD 98393 involved the first defendant. In any event, the first defendant was never a party to the alleged transfer for reasons already given. The plaintiff's surveyor's plan and the photograph taken in September 2004 as produced at the hearing of this appeal also do not prove that the said land was owned or disposed off by the first defendant.

[20] Learned counsel for the plaintiff had submitted before us that the learned judge failed to apply the rule of *Hadley v Baxendale* (1854) 9 Ex 341 under s 74(1) of the Contracts Act 1950 wherein the plaintiff contended that the first defendant had broken the contract and therefore the plaintiff is entitled to receive compensation for damages. We find the issue of damages under s 74(1) of the Contracts Act 1950 is premature and irrelevant to the present appeal before this court. The plaintiff is not entitled to any damages whatsoever as liability has not been established against the first defendant. The first defendant is not the proper party to be sued in this action and that no liability is owed to the plaintiff.

CONCLUSION

[21] It is our judgment that this is a fit and proper case for striking out under O 18 r 19 of the RHC. The learned judge had rightly confined himself within the four corners of the pleadings in deciding as to whether there is a cause of action against the first defendant. The learned judge had rightly considered the entire set of facts as disclosed in the pleading in deciding that there was no cause of action as against the first defendant as it was not the correct party to be sued.

[22] For the reasons stated we dismissed the plaintiff's appeal with costs and made an order that the deposits be paid to the first defendant to account of taxed costs.

Appeal dismissed.

Reported by Sally Kee